Filed 3/7/11 In re Violet D. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re VIOLET D. et al., Persons Coming Under the Juvenile Court Law.	B227772 (Los Angeles County Super. Ct. No. CK67124)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.N., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

A.N. appeals from an order reinstating the termination of his parental rights to Violet D. and Roberta D. pursuant to Welfare and Institutions Code[1] section 366.26. The termination order was reinstated on limited remand following a stipulated order reversing the matter for compliance with the Indian Child Welfare Act ("ICWA") (25 U.S.C. § 1901 et seq.). (*In re Violet D.* (May 25, 2010, B221430) [nonpub. opn].) For the second time, the father claims noncompliance with the ICWA requires reversal of the termination order. We affirm.

II. BACKGROUND

Violet (then one-year-old) and Roberta (then six months old) came to the juvenile court's attention after the Los Angeles County Department of Children and Family Services ("the department") filed a section 300 petition on their behalf. A.N. is the presumed father of Violet and Roberta. The petition was also filed on behalf of the children's two older half-siblings, Crystal D. and Julia D. The children all have the same mother, D.D. Crystal and Julia are not the father's presumed or biological children and are not the subject of this appeal.

As sustained, a second amended petition alleged the children's emotional and physical well-being was at risk due to the parents' conduct. The petition alleged the father and mother D.D. had a drug abuse history. The father had a substance abuse history including cocaine and painkillers. He had criminal convictions for possessing and using drugs. The father had physically abused Crystal by striking her with his fist, slapping her on the body, and striking her with a broom handle. The father and mother had a history of engaging in violent altercations in the children's presence. On prior occasions, the father struck the mother about her body with his hands and fists, kicked

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

her in the back and dragged her by the hair. The mother was a user of methamphetamine and marijuana.

On February 23, 2007, the father submitted a Parental Notification of Indian Status, Judicial Council, JV-130 form which indicated he had Apache ancestry. At the February 23, 2007 detention hearing, the father stated he thought his great grandmother "Mama Kika" had Apache heritage. The juvenile court ordered the department to investigate the father's potential Apache heritage. Violet and Roberta were ordered released to the father. The mother was permitted to live in the home but was not allowed to be left alone with the children.

On March 20, 2007, the department reported the parents were arrested for petty theft and the father remained incarcerated. The whereabouts of the mother, Violet and Roberta were unknown. On March 20, 2007, the juvenile court issued a protective custody warrant for Violet and Roberta. When the children were located on March 22, 2007, they were placed in foster care. On March 23, 2007, the juvenile court recalled the protective custody warrants.

The department filed the second amended petition on May 1, 2007. Also on May 1, 2007, the juvenile court ordered the children to remain detained. The father was released from incarceration on May 1, 2007.

On June 12, 2007, after striking out portions of the petition, the juvenile court sustained the second amended petition. The juvenile court specifically ordered the department to investigate compliance with the ICWA and to send proper notices. The matter was set for a disposition hearing. The juvenile court ordered the department to address compliance with the ICWA as to Julia's father, who had claimed Indian heritage in court on April 27, 2007.

In a July 3, 2007 disposition report, the department stated the father was arrested on June 26, 2007. The charges were unknown. The department reported the ICWA did not apply based on interviews with Julia's father J.H. The report did not contain any information about A.N.'s Indian heritage. At the hearing, the juvenile court stated it was aware that A.N. claimed Apache ancestry through a paternal great, great, great

grandmother "Mama Kika." The juvenile court stated it could not make the ICWA finding as to A.N. until the father was interviewed about the claim. The matter was continued to September 12, 2007 for a progress report to address ICWA notices for A.N.

An October 19, 2007 status review report states the ICWA does not apply. The ICWA notices were not attached to the report. But, the first of six pages of the Notice of Involuntary Child Custody Proceedings For an Indian Child was attached to the report. Also attached to the report was a letter dated September 26, 2007 from the White Mountain Apache Tribe stating Violet and Roberta were not enrolled in the tribe or eligible to become members.

A letter dated September 18, 2007 from the Yavapai/Apache Nation states the parents are not enrolled members of the Yavapai/Apache Nation. Based on information provided by the department, Violet and Roberta were not members or eligible for enrollment in the Yavapai/Apache Nation. The letter incorrectly spelled the father's name and incorrectly listed his date of birth as September 21, 1963 instead of September 2, 1963. The letter further stated: "Your inquiry shows no information that will establish the enrollment eligibility of the listed individual(s), remember we need information that ties the present individual to people several generations back and without ancestral information our hands are tied."

The Jicarilla Apache Nation's September 19, 2007 letter indicated the children were not eligible for enrollment. The September 17, 2007 San Carlos Apache Tribe's letter stated based on the documentation submitted, the parents' and children's names were not in their membership rolls. They were/are not eligible for enrollment with the San Carlos Apache Tribe. The September 19, 2007 Tonto Apache Tribe's letter states the children were not enrolled and were not eligible for enrollment into the Tonto Apache Tribe.

On November 5, 2007, at a six-month review hearing, the juvenile court found the parents in partial compliance with the case plan and continued reunification services. The matter was set for a 12-month review hearing.

In a status review report for April 18, 2008, the department reported the father had been incarcerated. On July 10, 2008, at the 12-month review hearing, the juvenile court found the father was not in compliance with his case plan. The father's reunification services were terminated. The mother was found in partial compliance with her case plan. The matter was set for a section 366.22 hearing. On September 30, 2008, at the section 366.22 hearing, the juvenile court terminated the mother's reunification services.

In an August 6, 2009 interim review report, the department stated Julia, Violet and Roberta were all living in the home of Mr. and Mrs. D., who are maternal great-grandparents. In a November 5, 2009 addendum report, the department stated the maternal great-grandparents wanted to adopted Julia, Violet and Roberta.

On December 4, 2009, the juvenile court found that Violet and Roberta were likely to be adopted and terminated parental rights. The father appealed asserting the notices given under the ICWA were insufficient because the department did nothing to investigate his claim of Apache heritage.

On May 25, 2010, we issued an opinion reversing and remanding the matter for compliance with the ICWA pursuant to the parties' stipulation. (*In re Violet D.*, *supra*, B221430.) On May 28, 2010, the juvenile court reinstated the father's parental rights. The department was ordered to properly serve ICWA notice for an August 27, 2010 section 366.26 hearing.

On August 27, 2010, the department filed a last minute information for the court. The department reported the ICWA notices were received by the United States Department of the Interior, Bureau of Indian Affairs and eight tribes on June 21, 2010. The following tribes received notices: White Mountain, San Carlos Apache, Fort Sill Apache, Yavapai/Camp Verde, Mescalero Apache, Jicarilla Apache, Tonto Apache of Arizona and Apache of Oklahoma. The department attached letters from the following tribes, which stated the children were not members and/or were ineligible for membership in the tribes: San Carlos Apache, Fort Sill Apache, Mescalero Apache, Jicarilla Apache, and Tonto Apache. The department requested the juvenile court to find

that ICWA did not apply to the Violet and Roberta "based on the above responses and the lack of letters for over 60 days from the date of receipt of ICWA notices . . . ."

On August 27, 2010, the juvenile court stated: "The father is not permitted [in the courtroom] if the only issue is ICWA." The father's counsel, Mr. Smeal, indicated there was a problem with compliance with the ICWA because no letter had been received from the Yavapai/Camp Verde Tribe. The juvenile court responded: "There's case law that says that you cannot keep going on and on and on and on with this. [¶] There was never any question that this was not Yavapai, and I'm not ordering another set of notices. [¶] So for Violet and Roberta I'm reinstating the termination of parental rights." When Mr. Smeal objected, the juvenile court stated: "Objection noted. [¶] I will ask the department to contact, by phone, the Yavapai Tribe. This is not an ICWA case. It's never been an ICWA case. It's not going to be an ICWA case." The juvenile court then reinstated the termination order orally. On September 24, 2010, the father filed an appeal from the August 27, 2010 ruling.[2]

On December 22, 2010, we granted the department's motion to augment the record on appeal to include return receipts from: San Carlos Apache Tribe, White Mountain Apache Tribe, Fort Sill Apache Tribe, Yavapai Apache Nation, Mescalero Apache Tribe, Jicarilla Apache Nation, Tonto Apache of Arizona, Apache of Tribe of Oklahoma, and the Bureau of Indian Affairs. The receipts were part of the juvenile court record but not included in the clerk's transcript on appeal.

We also granted the department's motion to take additional evidence on appeal. The additional evidence consists of the ICWA notices that were sent to the parents and the Bureau of Indian Affairs. The notices were also sent to White Mountain Apache Tribe, Fort Sill Apache Tribe of Oklahoma, Yavapai Apache Nation, Mescalero Apache

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[2] A certified minute order dated December 22, 2010 shows the juvenile court made findings that the ICWA did not apply and reinstated the prior parental rights termination order. The father's premature notice of appeal is deemed timely. (See Cal. Rules of Court, rule 8.104(d)(2); *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1262, fn. 4.)

Tribe, Jicarilla Apache Nation, Tonto Apache Tribe of Arizona, San Carlos Apache Tribe and Apache of Tribe of Oklahoma. The notices contain a number of aliases for the father with a birth date of September 2, 1963. The notices also state on June 9, 2010, the father reported that " Mama [Kika]" does not have Indian Heritage, [but] his great-great-great-grandfather [Jose B.] has Apache Indian Heritage through his mother's side. [The] father could not provide any other information." On June 11, 2010, a paternal aunt reported that "mother is caring [*sic*] Indian Heritage however they do not [know] which tribe."

III. DISCUSSION

The father argues reversal is warranted in the current appeal on the following grounds. The certified receipts and notices were not in the record. The record does not show the father was interviewed about his Native American heritage. The juvenile court allowed the Yavapai tribe to be contacted by telephone. None of these contentions warrant reversal of the order terminating parental rights as to Violet and Roberta.

"[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a).) When the tribe cannot be determined, the notice must be given to the Bureau of Indian Affairs. (*Ibid*; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.) The parties dispute whether the termination order must be reversed a second time to ensure compliance with the ICWA.

We begin by noting that, with the exception of the telephonic communication, the notice issues raised in this second appeal challenging ICWA notice were never raised in the juvenile court on remand. Rather, when asked if there was a problem with the notices, the father's counsel pointed out that there was no letter from the Yavapai/Camp Verdi Tribe. Counsel did not mention receipts, notice absences or a failure to interview the father. The rule is that "counsel for the parents bear a responsibility to raise prompt

objection in the juvenile court to any deficiency in notice so that it can be corrected in a timely fashion. This will best serve the interests of the dependent children, the Indian tribes, and the efficient administration of justice." (*In re S.B* (2009) 174 Cal.App.4th 808, 813.)

Courts have consistently refused to allow dependency proceedings to be prolonged for multiple appellate rounds challenging ICWA notices when the issues could have been raised and/or corrected in the juvenile court. For example, one court stated: "The purposes of the ICWA are indeed commendable, but we do not believe Congress envisioned or intended *successive* or *serial* appeals on ICWA notice issues when, given a proper objection, they could easily be resolved during proceedings on remand for the specific purpose of determining whether proper notice was given." (*In re X.V.* (2005) 132 Cal.App.4th 794, 798.) Another court concluded that "[a]t this juncture, allowing [a parent] to raise these issues on appeal for the first time opens the door to gamesmanship, a practice that is particularly reprehensible in the juvenile dependency arena." (*In re Amber F.* (2007) 150 Cal.App.4th 1152, 1156.)

We find no reason to vary from these well-reasoned opinions. The notice deficiencies, which were not raised in the special hearing on remand, have been forfeited. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re N.M.* (2008) 161 Cal.App.4th 253, 268-269.)

But, even considering the merits of the issues, there is no basis for reversing the parental rights termination order. The filing of certified receipts is not required under ICWA. (*In re S.B., supra,* 174 Cal.App.4th at p. 812; *In re N.M., supra,* 161 Cal.App.4th at pp. 268-269.) Nevertheless, the augmented record on appeal shows the receipts were a part of the juvenile court file but not included in the record on appeal. Thus, no error occurred.

The fact that the notices sent to the tribes were not received at the August 27, 2010 hearing does not require reversal. The notices were received by the juvenile court on December 22, 2010. Even if the juvenile court erred, the father must show the ICWA notice error was not harmless beyond a reasonable doubt. (*In re Celine R.* (2003) 31

Cal.4th 45, 60.) It is not reasonably likely that, had the notices been received into court on August 27, 2010, the result would have differed. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081.)

Similarly, the father's claim that the record does not show he was interviewed about his Indian heritage does not require reversal. The augmented record shows that the father's statements given on June 9, 2010 about his Indian heritage were included in the notices sent to the tribes. Thus, no interview was required and no error occurred.

The father also claims it was reversible error for the juvenile court to direct the department to contact the Yavapai Tribe by telephone. This was because there was no letter from the Yavapai/Camp Verde Tribe in the record by the time of the August 27, 2010 hearing. However, more than 60 days had passed since the Yavapai Indian tribes and the Bureau of Indian Affairs were served with notice of dependency proceedings. The telephonic communication concerning the children did not violate the ICWA because 60 days had elapsed without a response. Section 224.3, subdivision (e)(3) allows a court to determine the ICWA does not apply to the proceedings "[i]f proper and adequate notice has been provided . . . and neither a tribe nor the Bureau of Indian Affairs has provided a determinative response within 60 days after receiving that notice . . . ." The record shows Yavapai and other tribes received notices on June 21, 2010. The ICWA hearing on remand was conducted on August 27, 2010. More than 60 days had elapsed since notice was provided and no tribe or the Bureau of Indian Affairs claimed the children were Indian. (*In re N.M., supra,* 161 Cal.App.4that pp. 266-267.) In any event, the augmented record shows the Yavapai Tribe did not claim the children were Indian so any alleged error is harmless. (*In re N.M., supra,* 161 Cal.App.4th at p. 267, fn. 8; *In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.)

As an alternative ground for reversal, the father asserts the juvenile court erroneously excluded him from the courtroom at the August 27, 2010 hearing reinstating the parental rights termination order. The father was represented by counsel at the ICWA hearing. Because there is no evidence suggesting the father's presence at the hearing

would have resulted in a more favorable outcome, any error in excluding him was harmless. (*In re N.M.*, *supra*, 161 Cal.App.4th at p. 267, fn. 8.)

IV. DISPOSITION

The order terminating parental rights is affirmed.

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KUMAR, J.*

We concur:

MOSK, Acting P.J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.